IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8087 of 1997

For Approval and Signature:

HON'BLE SMT. JUSTICE ABHILASHA KUMARI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

USHABEN AMRATLAL MEHTA & 6 - Petitioner(s)
Versus
GANDHINAGAR DIST. PANCHAYAT & 1 - Respondent(s)

==========

Appearance :
MR MC SHAH for Petitioners
MR JM BAROT for MR HS MUNSHAW for Respondents

==========

CORAM : HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 19/04/2006

ORAL JUDGMENT

1. The petitioners herein are Female Health Workers, serving under the Gandhinagar District Panchayat. As per the averments made in the

petition, the respondents invited applications for the purpose of giving training to candidates as Female Health Workers. The petitioners were selected for the purpose of the said training and after undergoing the training for a period of one year and six months, the petitioners were appointed as Female Health Workers with effect from different dates and in the pay-scales as stated in paragraphs 6 to 11 of the writ petition. It is the grievance of the petitioners that after having appointed them, the respondents conducted fresh interviews for the purpose of appointing Female Health Workers and that such procedure adopted by the respondents, being violative of Articles 14 and 16 of the Constitution of India, is bad in law, inasmuch as the respondents are in the process of giving appointments to candidates who do not belong to Gandhinagar District, which according to the petitioners, is not permissible, since the appointments of Female Health Workers could only have been made from amongst those persons, such as the petitioners, who have undergone training

and belong to District Gandhinagar. Second grievance raised by the petitioners is that the respondents have conducted interviews of candidates for the purpose of giving appointments as Female Health Workers and that the appointments cannot be made solely on the basis of oral interview without resorting to a written test. The petitioners have prayed for the following reliefs:

(A) That Your Lordship may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction calling upon the 2nd respondent to declare that the petitioners have passed the Service Selection Committee test;

(B) That Your Lordship may be pleased to declare that entire action of the 2nd respondent and the procedure adopted by it in the matter of selecting candidates for Female Health Workers in October, 1997 is discriminatory and is

violative of articles 14 and 16 of the Constitution of India;

(C) That Your Lordship may be further pleased to issue a writ of injunction restraining the first respondent from appointing as Female Health Workers any candidates who were not called by it for training and further restraining it from discharging the petitioners from services;

(D) That pending admission, hearing and final disposal of this petition, Your Lordship may be pleased to issue an injunction restraining the first respondent from discharging the petitioners from the services and further restraining the first respondent from giving appointment as Female Health Workers to any persons, who are not sent by them for training;

(E) That such other and further relief as

the nature of the case may require may kindly be granted."

2. While issuing Notice, this Court (Coram: S.D.Pandit, J.), vide order dated 30.10.1997 granted interim relief to the effect that the services of the petitioners be not terminated till 17.11.1997. On subsequent dates, this interim relief was extended and on 28.1.1998, this Court (Coram: S.K.Keshote, J.), while issuing Rule made the interim relief granted earlier absolute till final disposal of the Special Civil Application.

3. I have heard Shri M.C.Shah, learned counsel for the petitioners and Shri J.M.Barot appearing vice Shri H.S.Munshaw, learned counsel for respondents and have gone through the pleadings and other material on record.

4. Shri M.C.Shah has submitted that the petitioners had been appointed as Female Health Workers and were continuing as such when in October, 1997, the respondents, on the basis of interview /

Service Selection Test, declared them as having failed at the said interview / test. According to him, the candidates who have been declared as having passed the said interview were not those candidates who had been sent for training as Female Health Workers as were the petitioners. Since the petitioners had already undergone training and were working as Female Health Workers, the action of the respondents in holding the interviews / Service Selection Test for appointments as Female Health Workers and declaring the petitioners as not having passed the same is bad in law since it results in discharging the petitioners from service after having put in long years of service as Female Health Workers. Moreover, by this method, the respondents are seeking to appoint Female Health Workers who have not undergone the training as have the petitioners.

In support of his contention that appointments cannot be made solely on the basis of oral interview in the absence of written examination,

Shri M.C.Shah has placed reliance on following decisions:

(i) ***AIR 1981 SC 487 – Ajay Hasia etc. v. Khalid Mujib Sehravardi and others etc.***

(ii) ***(1991)3 SCC 368 – Munindra Kumar and others v. Rajiv Govil and others***

(iii) ***1985 GLH (NOC) 31 – L.V.Ashara v. Gujarat Public Service Commission and others***

5. Per contra, Shri J.M.Barot has drawn the attention of this court to the affidavit-in-reply filed on behalf of respondent No.1 and has submitted that the Government of India has sanctioned a scheme for training of Female Health Workers through a Circular dated 19.5.1978 issued by the Ministry of Health and Family Welfare. Pursuant to this scheme, the Health and Family Welfare Department of the State of Gujarat issued a Notification dated 12.1.1988 sanctioning a Female Health Workers' school for the purpose of training of Female

Health Workers from time to time. The training course to be so conducted is known as “Female Health Workers Basic Training Course”. Under the said scheme, the State of Gujarat has started a training school for Female Health Workers in the State, involving a detailed course, admission rules, method of selection, requirement of educational qualifications and other requisite criteria. The Selection Committee comprising of District Health officer, Additional District Health Officer and representative of the District Development Officer as well as representative of District Health Committee selects students to be sent for such training. Each District Panchayat deputes candidates to be sent for training as Female Health Workers from a select list. The above procedure is as per Notification dated 12.1.1988 which has been annexed as Annexure-A to the said affidavit-in-reply. The said training course is simply a study course and the Government or the District Panchayat does not give any assurance for employment under it. A perusal of the same also

makes it clear that the candidates admitted to the training course shall be paid stipend of Rs.125/- per month or at the rate prescribed by the Government from time to time during the period of one and half years' training and candidates will be required to execute a bond of Rs.5,000/- with surety, which is binding on the candidates, to serve under the District Panchayats/ State Government for a minimum period of two years. It is further submitted by Shri Barot that after the completion of the training by petitioners, regular selection as per the Recruitment Rules for the cadre of Female Health Workers, framed under the Gujarat Panchayats Act, 1993, could not take place due to certain administrative exigencies. Due to this reason, the petitioners were appointed on purely *ad-hoc* and temporary basis with a specific condition that the appointment would be for a duration of one year or till the regularly selected candidates are available. The appointment letters of the petitioners have been annexed to the writ petition collectively.

However, the petitioners were still working till the filing of the writ petition. Ultimately, a public advertisement was issued by the District Panchayat on 1.2.1997, for the regular selection of Female Health Workers, a copy of which has been annexed as Annexure-D to the reply affidavit. As per this advertisement, a total of 23 posts, divided amongst various categories, were to be filled up. Pursuant to the said advertisement, the present petitioners applied for the regular posts of Female Health Worker and participated in the oral interviews which were held as per Recruitment Rules. The petitioners, except for petitioner No.7, did not qualify and their names did not figure in the select list, whereas petitioner No.7 was successful and her name was placed in the waiting list. Shri J.M.Barot has further submitted that in view of the fact that the petitioners could not qualify in the regular selection, after facing the interview, they cannot claim regularization *de-hors* the procedure prescribed under the Rules and if this

is done, it will result in back-door entry, which is not permissible in law. In support of this contention, reliance has been placed in the decision reported in ***1996(2) GLH (UJ) 21 – Rameshbhai C.Patel v. Dashrathbhai B.Solanki***.

6. So far as the decisions cited by learned counsel for the petitioners are concerned, they may not lend much support to the submissions made by him.

In *Ajay Hasia etc. v. Khalid Mujib Sehravardi and others etc.* (supra), the challenge was to the validity of admissions made to the Regional Engineering College, Srinagar. The principal contention that was advanced was that the society under which the college in question was established had acted arbitrarily in the matter of granting admissions by ignoring the marks obtained by the candidate at the qualifying examination by relying upon viva-voce examination as a test for determining the competitive merit of the candidates in the case

and further, by allocating 50 marks for viva-voce examination as against 100 marks allocated to the written test. This case dealt with admissions to an Engineering College, which was an institution imparting specialized technical education, whereas, in the present case, the petitioners are already working as Female Health Workers on *ad-hoc* basis and in that capacity, have participated in the interview for the purpose of regular selection / appointment as per Recruitment Rules in pursuance to the advertisement dated 1.2.1997. Even in *Ajay Hasia's* case (supra), the challenge to the interview was not upheld. The facts of that case are entirely different from the facts of the present one and this judgment does not, in any manner, lend support to the contentions raised by petitioners.

In *Munindra Kumar and others v. Rajiv Govil and others* (supra), the challenge was to the rule fixing 40% of the total marks for group discussion and interview, where the selection

comprised of a written test, group discussion and interview. There, the selection of Assistant Engineers by the U.P. State Electricity Board was in question, and the rule made by the U.P. State Electricity Board keeping 40% marks for interview and 40% for discussion was quashed as being arbitrary. In the present case, no rule is under challenge. The Recruitment Rules under which the selection and appointments for regular Female Health Workers came to be made are also not under challenge in this petition.

In *L.V.Ashara v. Gujarat Public Service Commission and others* (supra), the challenge was to the allocation of 50% marks for viva-voce test held for selection of candidates for appointments to the post of Executive Engineers in Gujarat Service of Engineers.

In the present petition, there is no reference whatsoever as to the number of marks allocated under different heads, if any, in the interview under challenge. Therefore, the ratio laid down

in this case will also not be applicable.

7. A perusal of the relief clause reveals that the petitioners have sought contradictory reliefs inasmuch as in paragraph – 23(B) of the writ petition, the petitioners have prayed for a direction to declare the entire action by respondent No.2 and the procedure adopted by it in the manner of selecting the candidates for the post of Female Health Workers in October 1997 as discriminatory and violative of Articles 14 and 16 of the Constitution of India, whereas in paragraph – 23(A), the petitioners have prayed for issuance of an appropriate writ, order or direction calling upon the second respondent to declare the petitioners as having passed the Selection Committee Test. On the one hand, the petitioners are seeking to declare the procedure of selection/ appointment of Female Health Workers as discriminatory and violative of Articles 14 & 16 of the Constitution whereas on the other, they are seeking a direction that they should be declared as having passed in the

same interview. The Recruitment Rules for selection and appointment of Female Health Workers have not been challenged by petitioners in the writ petition. A perusal of the advertisement reveals that apart from other candidates, persons who had been appointed as Female Health Workers on *ad-hoc* basis (as were the petitioners), were also called upon to participate in the selection process. Having subjected themselves to the interview and having remained unsuccessful, the petitioners cannot challenge the said interview. In ***AIR 1995 SC 1088*** titled ***Madan Lal and others v. State of Jammu & Kashmir*** and others, the Supreme Court has held as under:

> *"9. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition we cannot sit as a Court of appeal and try to re-assess the*

relative merit of the concerned candidates who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a court of appeal over the assessment made by such an expert committee.

10. In the light of the aforesaid settled legal position let us see whether there is any substance in the contentions canvassed before us by the learned senior counsel for

unsuccessful candidates at the oral interview"

8. The petitioners, after having undergone the training course, were given *ad-hoc* appointments which are *dehors* the Recruitment Rules. The initial appointments of the petitioners are, therefore, not in accordance with the procedure prescribed by Rules and are purely *ad-hoc* and subject to the condition that they were to continue for a period of one year or till the appointments of regularly selected incumbents, whichever is earlier. These appointments are also not against any sanctioned posts. In ***2006(1) SCC 667 – State of U.P. v. Neeraj Awasthi and others,*** the Supreme Court has held that:

"75. The fact that all appointments have been made without following the procedure, or services of some persons appointed have been regularised in the past, in our opinion, cannot be said to be a normal mode which must receive the seal of the court. Past practice is not always the best

practice. If illegality has been committed in the past, it is beyond comprehension as to how such illegality can be allowed to perpetuate. The State and the Board were bound to take steps in accordance with law. Even in this behalf Article 14 of the Constitution will have no application. Article 14 has a positive concept. No equality can be claimed in illegality is now well settled. (See State of A.P. v. S.B.P.V. Chalapathi Rao (1995)1 SCC 724, SCC para 8; Jalandhar Improvement Trust v. Sampuran Singh – (1999)3 SCC 494, SCC para 13 and State of Bihar v. Kameshwar Prasad Singh – (2000)9 SCC 94 : 2000 SCC (L&S) 845, SCC para 30).

76. In the instant case, furthermore, no post was sanctioned. It is now well settled when a post is not sanctioned, normally, directions for reinstatement should not be issued. Even if some posts were available, it is for the Board or the Market Committee to fill up the same in terms of the

existing rules. They, having regard to the provisions of the Regulations, may not fill up all the posts."

9. From a reading of the averments made in the writ petition and relief clause 23(A), an impression is being created by the petitioners that the respondents had held an "in-service selection test" in which the petitioners had participated and remained unsuccessful. In fact, this is a mis-statement of fact. No service selection test has been held by respondents, but interviews have been held pursuant to the advertisement dated 1.2.1997, in which the petitioners also participated for the purpose of selection and appointment as Female Health Workers on a regular basis as per Recruitment Rules. It is an admitted position that the initial appointments of petitioners were on *ad-hoc* basis, *de-hors* the Recruitment Rules and not against any sanctioned posts, which is clear from the appointment orders of petitioners and the conditions stipulated therein that their appointments shall be for a period of one year

or till appointment of a regularly selected candidate, whichever is earlier.

10. Moreover, the training undergone by the petitioners was simply in the nature of a study course and no assurance was held out to them, at any stage, that they would be offered appointments by virtue of undergoing such training. The impugned selection process was initiated by the respondents as per Recruitment Rules and the advertisement 1.2.1997 has clearly identified 23 sanctioned posts of Female Health Workers which were sought to be filled up on a regular basis. The eligibility criteria of the candidates has also been specified and there is a clear stipulation in the advertisement that the Female Health Workers who are working on *ad-*hoc basis can also participate in the recruitment process for regular appointment. The advertisement does not envisage any preference to be given for past training. Therefore, the contention of the petitioners that persons who have been selected have not undergone the same

training as them is not sustainable. Out of the petitioners, petitioner No.7 was successful in the interview for fresh recruitment and her name was placed on the waiting list. The fact that the petitioners could not be declared successful does not invalidate the entire procedure. Regarding the contention raised by the learned counsel for the petitioners that the selected candidates do not belong to Gandhinagar District, there is no such eligibility criteria or condition mentioned in the advertisement dated 1.2.1997 pursuant to which, selection/ recruitment on regular basis was made. This being the position, the relief claimed by the petitioners cannot be granted, in view of the factual and legal position, referred to in detail hereinabove.

11. The petitioners have also laid challenge to the entire selection process, but the selected persons have not been made parties to the writ petition. It is a settled position of law that no relief can be claimed which will adversely

affect the rights of third parties, without such parties being arrayed as parties to the petition. Moreover, the candidates selected in the impugned recruitment process have been working for several years and the said process cannot be set aside or declared to be violative of Articles 14 and 16 of the Constitution of India without making them parties since they would be directly affected by the same. The Supreme Court, in ***AIR 1998 SC 331*** titled Arun ***Tewari and others v. Zila Mansavi Shikshak Sangh and others etc.*** held as under:

> *"12. All the original applicants before the Tribunal who have challenged these provisions for recruitment of Assistant Teachers under the Operation Black Board Scheme did not possess the requisite qualifications for being selected under the said scheme as Assistant Teachers. Their names do not figure among the lists forwarded by the concerned District Employment Exchanges. Surprisingly, the applications filed by all these persons and/or groups before the Tribunal did not*

make the selected/appointed candidates who were directly affected by the outcome of their applications, as party respondents. The Tribunal has passed the impugned order without making them parties or issuing notice to any of them. The entire exercise is seriously distorted because of this omission. They have now filed the present appeals after they have been granted leave to file the appeals. In the case of Prabodh Verma v. State of Uttar Pradesh, (1984) 4 SCC 251 at page 273 : (AIR 1985 SC 167 at p. 180), this Court observed that in the case before them there was a serious defect of non-joinder of necessary parties and the only respondents to the Sangh's petition were the State of Uttar Pradesh and its concerned officers. The employees who were directly concerned were not made parties - not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. This Court observed that High Court ought

not have decided a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them before it as respondents in a representative capacity. These observations apply with equal force here. The same view has been reiterated by this Court in Ishwar Singh v. Kuldip Singh, 1995 Supp (1) SCC 179, where the Court said that a writ petition challenging selection and appointments without impleading the selected candidates was not maintainable. (Vide also J. Jose Dhanapaul v. S. Thomas, (1996) 3 SCC 587, paragraph 4). On this ground alone the decision of the Tribunal is vitiated. However, even on merit we do not find that the judgment of the Tribunal can be sustained. (emphasis supplied)

... ...

21. We do not see any reason to fault the procedure prescribed or the qualifications prescribed or to set aside these selections and consequent appointments since none of

the grounds on which the amendments, circulars and selections have been challenged, is sustainable in law. We have been informed that after the stay of the judgment of the Tribunal by this Court, those who were selected/appointed under the prescribed procedure have been given appointments and they have been functioning as Assistant Teachers. In the cases of selected candidates not joining, the persons kept on the relevant waiting list in order of merit have been given appointments. There is no reason to set aside these appointments."

12. **Viewed from every angle, no relief, as prayed for, can be granted to the petitioners. The writ petition is therefore dismissed.**

13. However, a glaring aspect and dimension is visible through the facts and circumstances of this case, and it is this, that the petitioners were appointed as Female Health Workers on *adhoc* basis, much before the selection process for

appointment of regular Female Health Workers was initiated by the respondents. Their dates of initial appointments, as stated in the writ petition are as under:

First petitioner - 2.5.1983

Second petitioner - 16.8.1991

Third petitioner - 16.8.1991

Fourth petitioner - 22.8.1991

Fifth petitioner - 7.1.1991

Sixth petitioner - 16.8.1991

Seventh petitioner- 4.12.1994

As per the averments made in the affidavit-in-reply filed by respondent No.1, although the Recruitment Rules were in existence, no regular selection could take place due to “administrative exigencies”, therefore, the petitioners were appointed on *ad-hoc* and temporary basis, with specific conditions. These appointments were continued from time to time. It is stated that the petitioners were appointed temporarily without following due recruitment procedure, only because they were qualified,

which does not give them the right to continue without submitting to the prescribed procedure as per Rules. The advertisement was issued by the respondent – District Panchayat on 1.2.1997, for recruitment of 23 Female Health Workers. The petitioners have been allowed to work with effect from 1983, 1991 and 1994, without any procedure being initiated for the regular recruitment process by the respondents. What the "administrative exigencies" were, that prevented the respondents from making regular recruitments and permitting the petitioners to work on *ad-hoc/* temporary basis, remains undisclosed. Needless to say, as stated in the petition, the first petitioner worked for approximately 23 years, petitioners No.2 to 6 for about 15 years and petitioner No.7 for about 12 years. By now, they must have crossed the age bar if they were to seek any other employment. Another aspect is, that they are qualified, as per the admission of the respondent No.1 in the reply, and have gained sufficient experience as Female Health Workers. In view of this position, it would be

in the interest of justice, equity and fair play that, subsequent to the dismissal of the present writ petition, if the respondents take any action which is detrimental to the petitioners as apprehended by them, and if any vacancies of Female Health Workers arise due to this action or otherwise come into existence or are already existing, in that eventuality, the candidature of the petitioners shall also be taken into consideration and they shall be called upon to participate in such selection/ recruitment process by the respondents. The dismissal of the writ petition shall not come in the way of the petitioners in such procedure. The respondents will consider the case of the petitioners sympathetically on humanitarian grounds and while keeping their experience in mind, give them preference on account of the same. The requirement of age may be relaxed in their cases. Participation of the petitioners in any recruitment/ selection procedure shall be carried out in accordance with the Rules, subject to the above stipulations. However, in

the facts and circumstances discussed hereinabove, if the respondents feel that it would be in the fitness of things to allow the petitioners to work in the same capacity as they are working and not take any action detrimental to them, then it is open for the respondents to do so.

14. It is, however, made clear that this is being done looking to the peculiar facts and circumstances of the case and the hard fact that the petitioners may now have become over-age for any other employment, after long years of working, and pursuing their remedy in this Court. Accordingly, the above observations are relevant only to the facts of this case and may not be construed or used as a precedent in any other case.

15. Rule is discharged. Interim order stands vacated. No order as to costs.

(Smt. Abhilasha Kumari, J.)

(sunil)